CHEW TENG CHEONG & ANOR. v. PANG CHOON KONG

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Yusoff Mohamed J.) October 12, 13, 1980 & February 8, 1981]

[Johore Bahru — Federal Court Civil Appeal No. 13 of 1980]

Contract — Agency — Estate agents — Whether agent entitled to remuneration — Whether agent can show that some act of his was the causa causans of the transaction or the efficient cause of the sale — Construction of agreement.

In this case an agreement was entered into between the Government of Pahang and thirty persons whereby the persons were given a licence to extract timber produce over an area of 24,000 acres in Pahang. Amongst the terms of the licence was one forbidding the transfer of the rights in the licence. At the relevant time 6,000 acres had been exploited leaving an area of 18,000 with any commercial value. One Au Ah Wah claimed to have obtained all the rights to the remaining area. He agreed to transfer all these rights to the respondent, to whom he was introduced by the appellants. The agreement provided for the transfer of the licensees' interests rights and title in the land to a company to be formed by Au Ah Wah. The respondent was to make available a sum of $1,200,000 for paying off the licencees. By another agreement the respondent agreed to pay the appellants who had introduced him to Au Ah Wah the sum of $900,000. In the event no company was formed as there were dissensions among the 30 licencees. Subsequently the Government of Pahang entered into an agreement with the 30 licensees for the termination of the agreement with them to enable the Government to enter its separate agreements with three companies for the purpose of felling and logging the remaining 18,000 acres. Au Ah Wah acted as attesting witness in the legal documents necessary for the transfer. After the rights were transferred to the three companies, the respondent acquired the rights of two of the companies with the result that the benefits passed to the respondent and another through the instrumentality of Au Ah Wah The appellants claimed the remuneration agreed to be paid to them. The High Court dismissed their claim and they appealed to the Federal Court.

Held, allowing the appeal: on the evidence, Au Ah Wah had performed his contract with the respondent and as provided for in the agreement the rights of the appellants had accrued on the performance of the said contract with Au Ah Wah. It is true that the negotiations with the original licensees had to negotiate a further channel, but that did not alter the fact that the respondent came to the picture through the introduction of the appellants nor that the hand of Au Ah Wah was seen throughout the weaving of the fabric.

Cases referred to:-

(1) *Sushames* v. *Cumming* [1962] N.Z.L.R. 920, 925.
(2) *Tribe* v. *Taylor* (1876) 1 C.P.D. 505, 510.
(3) *Millar* v. *Radford* [1903] 19 T.L.R. 575.
(4) *Burchell* v. *Gowrie and Blockhouse Collieries Limited* [1910] A.C. 614.
(5) *Symons* v. *Callil* [1923] V.L.R. 49.
(6) *Hansen Real Estate* v. *Jones and Jones* [1980] N.Z. L.R. 284.
(7) *Green* v. *Bartlett* (1863) 14 C.B. (N.S.) 681.
(8) *Tong Lee Hua* v. *Yong Kah Chin* [1979] 1 M.L.J. 233.

FEDERAL COURT.

U. Masacorale (*S. Sagadeva* with him) for the appellants.

G.S. Nijar (*Lim Cheun Ren* with him) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The subject matter of this appeal is an area of some 18,000 acres of timber-land in Pahang. The profits to be made were enormous — they were said to be $18,000,000. So when it was noised about that one Au Ah Wah had the rights to this area, his acquaintance was eagerly sought. Those who did not know him personally sought therefore introductions from those who knew and were prepared to pay considerable sums for the introduction.

The appellants and one Lin Wyen Pang who was one of the plaintiffs in the action but chose not to appeal from the dismissal of their claims introduced the respondent to Au Ah Wah. Arising from that introduction, an agreement was drawn up between the respondent and Au Ah Wah on March 20, 1973 (the March 20 agreement) for the transfer of all his rights in the timber-land to the respondent. We shall refer more fully to the terms of this agreement later. The obligation of the respondent to the introducers was incorporated in another agreement between them on March 31, 1973 (the March 31 agreement). On this agreement, the appellants and Lin Wyen Pang sued for the $900,000 promised to them therein. The High Court dismissed their claim and they now appeal to this court.

The law to be applied is therefore the law of estate agents. Where the agency contract provides that the agent earns his remuneration upon bringing about a certain transaction, he will be entitled to such remuneration if he is the effective, not necessarily the immediate cause of the transaction being brought about. Whether there is a sufficient connection between his act and the ultimate transaction must be ascertained from the facts of the case. "The effectiveness of the agent's work is a matter of inference from the evidence" *per* McGregor J. in *Sushames* v. *Cumming*.(1) Where the agent can show that some act of his was the *causa causans* of the transaction (*Tribe* v. *Taylor*(2)) or was an efficient cause of the sale (*Millar* v. *Radford*(3)), he is entitled to his agreed remuneration. Both of these cases were approved in the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries Limited*,(4) which itself is a case where the broker was held entitled to recover because he had brought the company into relation with the actual purchaser, although the company had sold behind his back. See also *Symons* v. *Callil*(5) (Full Court of Victoria). So where the property was eventually bought not by the lady introduced by the agent but by her husband as part of a property settlement then being negotiated and on the intimation by the wife that she desired that property, it was held that the husband's action in obtaining the property for his wife had the same effect as a direct approach by the lady to the owners would have had: *Hansen Real Estate* v. *Jones & Jones*.(6) We need to refer to only two more cases. In *Green* v. *Bartlett*,(7) a potential buyer had asked the auctioneer, after the auction sale had not reached the reserved price, for the name of the owner and with the knowledge had purchased the property directly from him. The auctioneer was held entitled to his commission. In *Tong Lee Hua* v. *Yong Kah Chin*,(8) this court considered the case as one of strict construction of the contract between the parties.

It is clear that the claim of the appellants depends on the proper construction to be given to this March 31 agreement. It recited that they were responsible for the March 20 agreement and then said that they were relinquishing their rights to the timber-

land upon certain terms. By all accounts it was a rather curiously drawn up document. But the consideration was stated in the following terms:

"1. In consideration of the Second, Third and Fourth Parties relinquishing the rights to the 18,000 acres of forest land the subject matter of the said contract between the First Party and Au Ah Wah dated 20th day of March, 1973 the First Party hereby covenants with the Second, Third and Fourth Parties as follows:

(a) to pay the sum of Dollars Fifty ($50) per acre on the said forest land of 18,000 acres that is: Dollars Nine Hundred Thousand ($900,000) to the Second, Third and Fourth Parties in equal shares upon the performance of the said contract between Au Ah Wah and Pang Choon Kong that is to say upon the payment of the entire consideration of $1.2 million to Au Ah Wah subject to the following terms;

(b) to pay the Second, Third and Fourth Parties the sum of Dollars Five hundred and Forty thousand ($540,000) as aforesaid within two (2) weeks on the performance of the said contract with Au Ah Wah; provided that the licence to fell timber for the first thousand acres be issued by the relevant authorities;

(c) to pay the Second, Third and Fourth Parties the sum of Dollars Three hundred and Sixty thousand ($360,000) within six (6) months after the first payment of the Dollars Five hundred and Forty thousand ($540,000) as aforesaid and provided always that the licence to fell timber on the first thousand acres shall be granted pursuant to the said contract between the First Party and Au Ah Wah and the First Party shall issue a post-dated cheque within six (6) months upon the first payment of the $540,000 to Second, Third and Fourth Parties, in equal shares."

As we read the agreement, the payment was for $900,000 only which though a large sum is but 5% of the profits to be derived from the venture. It was to be paid in two stages and dependent on the transfer of Au Ah Wah's rights and the issue of a licence, the licence being absolutely necessary to give validity to the transfer as the original licence is personal to the holder and it is forbidden by law and by the licence itself to transfer assign or otherwise part with it to third parties. We will observe that the agreement is silent as to any other events absolving the respondent from his obligation to pay the agreed sum for the introduction to Au Ah Wah.

Nevertheless the respondent in his defence now said that Au Ah Wah had no rights to the timberland, they belonged to 30 licensees; it was a term of the March 20 agreement that it was conditional upon the consent of the 30 licensees and the approval of the Government and these Au Ah Wah had failed to obtain. He said there was a failure of consideration. Further and in the alternative the March 31 agreement was bad in law.

It is now necessary to turn to the events leading up to the two agreements. On October 1, 1966 an agreement was entered into between the Government of Pahang and thirty persons (the licensees) whereby the latter were given a licence to extract forest produce over an area of 24,000 acres subject to the terms and conditions therein set out. Amongst them was one forbidding the transfer by any means of the rights in the licence: clause 16. At the relevant time, 6,000 acres had been exploited leaving an area of 18,000 with any commercial value. Au Ah Wah claimed to have obtained all the rights to the remaining area. He did not say by what means he did so nor did he produce any document signed by the licensees. In view of clause 16 the nature of those rights might well be questioned. Nevertheless he claimed to have acquired the rights over this area of land and he agreed in the March 20 agreement to transfer all these rights to the respondent, to whom he was introduced by the appellants. What those rights were did not appear to have been defined anywhere in the agreement, though the parties thereto did not appear to have been in any doubt about them. But the agreement was clearly for the transfer of the licensees' interests rights and title to the land and it was represented that Au Ah Wah had the means of effecting this transfer, if not of enforcing it. Clause 6 therefore provides that the respondent should make available to Au Ah Wah a sum of $1,200,000 for "paying off" the licensees whose names were set out in an enclosure by way of a schedule annexed to the agreement. It was also agreed that the rights of these licensees were to be transferred to a company to be formed for the respondent by Au Ah Wah who was also then an advocate and solicitor. But for such a transfer to be lawful and effective, it must be with the approval of the Government. Au Ah Wah consequently had to undertake to obtain the approval of as well as the transfer of the rights of the 30 licences. The time agreed to was 3 months from the date of the contract. The fruits to be harvested by Au Ah Wah on the successful outcome of the venture were fairly substantial. They were fully set out in the agreement but are of no concern in this appeal.

In the event no company was formed to which all the 30 licensees transferred these rights. This was because of dissensions amongst them. In the words of Au Ah Wah, 12 ran out on him. And on September 7, 1973, Au Ah Wah and the respondent executed a short agreement rescinding the March 20 agreement. If the matter had stopped here, there clearly could be no claim by the appellants against the respondent. But the matter did not stop at this point.

On November 10, 1973, the Government entered into a new agreement with the 30 licensees for the termination, so-called, of the first agreement of August 1, 1966 to enable the Government to enter into separate agreements with three companies, Syarikat Hayati Sdn. Bhd., Syarikat Bertapak Sdn. Bhd. and Syarikat Sastiva Bharu Sdn. Bhd. (Hayati, Bertapak and Sastiva respectively) for the purpose of felling and logging the remaining 18,000 acres. To enable this to be done, this area was sub-divided into 3 as clearly shown on a plan annexed to the agreement. Hayati was to get 6,000 acres, Bertapak 4,800 and Sastiva 7,200 acres. There can be no doubt of the purpose of this agreement from the part played by Au Ah Wah in effecting it. He was the witness for all the thirty licensees. The agreement also provided for the allocation of these licensees to the three companies. Hayati was allotted 10, Bertapak 8 and Sastiva the remaining 12, who deductively must be the 12 who ran out on Au Ah Wah.

Following this agreement, the Government on May 27, 1974 entered into separate agreements with the three companies for the extraction of forest produce from these areas. Once again Au Ah Wah

signed as attesting witness to the execution of the agreements by the directors of the three companies.

A search in the Registry of Companies revealed the following: Of those original licensees, only 2 of the 10 allotted to Hayati remained as shareholders. Bertapak also had 2 of the 8 allotted to it. One of the other 6 had died however and it is not known what had happened to his allocation. The full complement of twelve remained with Sastiva, the two who had died being substituted by their personal representatives.

It is not however suggested that there is any significance in this as the rights of the licensees had passed to the companies and the question whether the respondent had acquired any rights over the timber area must be determined by an examination of the composition of the three companies. It will be sufficient to observe shortly that in Bertapak and Hayati, the shareholders and the directors include several persons with the same surname as the respondent. Quite a few of them reside at his address. The same is perhaps not true with Sastiva but the curious feature is that the directors reside at Pahang, but the registered office is in Kuala Lumpur and it had a Chinese secretary.

The only conclusion to be reached on this documentary evidence must be that the respondent had obtained the rights certain to the 10,800 acres given to Hayati and Bertapak. As for the 7,200 acres allotted to Sastiva, the respondent admitted that he knew that one Tan Seng Eng had obtained the licences issued to Sastiva and the documentary evidence in the three agreements made, two on September 7, and the third on September 12, 1973, is to the effect that whatever benefits were obtained in the matter by Au Ah Wah and Tan Seng Eng, they were all passed over to the respondent and another, through the instrumentality of Au Ah Wah.

On all this evidence, we can only form one conclusion that Au Ah Wah had performed his contract with the respondent and as provided for in the March 31 agreement (which is the relevant one for construction in the determination of the rights and obligations between the parties) the rights of the appellant had accrued "on the performance of the said contract with Au Ah Wah." The other requirement in the contract was the issue of a first licence to fell 1,000 acres. The evidence of Harun bin Ismail, the Deputy Director of Forestry (PW3) was that at the date of hearing, 10,000 of the 18,000 acres had been worked. The obligation of the respondent to pay the appellants had therefore crystallised. It is true that the negotiations with the original licensees had to negotiate a further channel, but that did not alter the fact that the respondent came into the picture through the introduction of the appellants, nor the other fact just as clear, that throughout the weaving of the fabric, the hand of Au Ah Wah was seen.

For these reasons, the appeal is allowed with costs here and in the court below. Judgment will be entered for the plaintiffs as prayed.

Appeal allowed.

Solicitors: *Jackson & Masacorale; Yeow & Chin.*

COLLECTOR OF LAND REVENUE v. LOOI LAM

[F.C. (Suffian L.P., Chang Min Tat & Abdul Hamid F.JJ.) December 10, 1980 & February 13, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 238 of 1979]

Land law — Land Acquisition — Compensation for damage to property — Damage "likely to be sustained" — Whether can be awarded at time of reference to High Court — Land Acquisition Act, 1960, First Schedule paragraph 2(d).

In this case the Government acquired part of the land belonging to the respondent. The Government acquired an area of 15,540 sq. ft. and a further area of 4,005 sq. ft. not acquired was severed from the rest of the land. The land was required to change the course of the Sungai Benus which passed through Kampung Bahru. As a result of river deviation work done on behalf of the Government after acquisition, the house belonging to the respondent was badly damaged and required extensive repair. The Collector of Land Revenue made an award of compensation of (a) $54,390 for the land acquired and (b) $900 as disturbance money. No award was made in respect of damage to the house. The respondent was dissatisfied with the award and the matter was referred to the High Court. Vohrah J. confirmed the awards of the Collector under (a) and (b) and in addition awarded (c) $8,101 as compensation for damage sustained by reason of the severance of 4,005 sq. ft. from the rest of the land; and (d) $40,185 compensation for damage to the house. The Collector appealed against the award of compensation for the house. It was argued that the compensation, if payable, should have been the subject of a separate suit.

Held: as paragraph 2(d) of the First Schedule to the Land Acquisition Act, 1960, refers to the damage "likely to be sustained" by the person interested, the damages for injurious affection to the house in this case could be claimed and was rightly awarded in the course of a reference to the High Court under the Act.

Cases referred to:-

(1) *Collector of Dinagepore* v. *Girja Nath Roy & Ors.* I.L.R. 25 Cal. 346.

(2) *Cowper Essex* v. *Acton Local Board* (1889) L.R. 14 App. Cas. 153.

(3) *R.H. Wernicke* v. *Secretary of State for India in Council* 13 Calcutta Weekly Notes 1047.

(4) *His Highness The Gaekwar of Baroda* v. *Gandhi Kachrabhai Kasturchand* (1903) L.R. 30 I.A. 60.

(5) *Croft* v. *L. & N.W.Ry. Co.* (1863) 32 L.J. Q.B. 113; 122 E.R. 164.

The following cases were also cited in argument: *Biscoe* v. *Great Eastern Railway Company* (1873) L.R. 16 Eq. 636. headnote; *Tapidas Govindbhai* (1869) Bombay H.C.R. 116; *Collector of Dinagepore* v. *Girja Nath Roy & Ors.* I.L.R. 25 Cal. 346; *In re The Stockport, Timperley and Altringham Railway Company* (1864) 33 L.J. Q.B. 251; *R.H. Wernicke & Ors.* v. *The Secretary of State for India in Council* (1908) 13 C.W.N. 1046; *The Chairman, &c., of the Metropolitan Board of Works* v. *Owen McCarthy* Vol. VII, English and Irish Appeals (1874) 243.

FEDERAL COURT.

Dato' Haji Abu Mansor bin Ali (Senior Federal Counsel) for the appellant.

Roland Khoo for the respondent.

Suffian L.P. (delivering the judgment of the Court): Lot 412, Certificate of Title No. 13287, Town of Kuala Lumpur, is a large piece of land of approximately 1.994 acres in Kampong Bahru, upon which stood a large two-storey house No. 175, Jalan Raja Muda.

To change the course of the Sungai Benus which passed through Kampong Bahru, Government acquired part of it under the Land Acquisition Act, 1960 ("the